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NOT TO BE PUBLISHED IN OFFICIAL REPORTS

COURT OF APPEAL, FOURTH APPELLATE DISTRICT

DIVISION ONE

STATE OF CALIFORNIA

MARGARITA CHAVEZ, Plaintiff and Respondent, v. WELK RESORT GROUP, INC. et al., Defendants and Appellants.	D073502 (Super. Ct. No. 37-2017-00026661-CU-BT-NC)
LEANNA HOLTZCLAW et al., Plaintiffs and Respondents, v. WELK RESORT GROUP, INC. et al., Defendants and Appellants.	D073775 (Super. Ct. No. 37-2017-00026666-CY-BT-NC)

CONSOLIDATED APPEALS from orders of the Superior Court of San Diego County, Ronald F. Frazier, Judge. Reversed.

Goodwin Procter and Brooks R. Brown, David J. Zimmer, William Jay; Welk Resort Group, Inc. and Ronald E. Naves, Jr. for Defendants and Appellants.

Paschall Law and Patrick D. Paschall; Williams Iagmin and Jon R. Williams for Plaintiffs and Respondents.

Defendants Welk Resort Group, Inc. and Welk Resorts Platinum Owners Association (Welk) appeal two orders denying Welk's petitions to compel arbitration of actions filed by Plaintiffs Margarita Chavez, Leanna Holtzclaw, and Vannara Chantha against Welk. In those actions, Plaintiffs assert statutory and common law claims against Welk based on allegations that Welk misrepresented and omitted material facts to induce Plaintiffs into purchasing an interest in a vacation timeshare program.

Welk contends that these disputes belong in arbitration pursuant to a provision in the parties' timeshare purchase agreement requiring arbitration of any claims arising out of or relating to the timeshare purchase agreement. Welk further contends that the trial court erroneously found the arbitration provision to be unconscionable and, therefore, unenforceable. We agree. Accordingly, we reverse.

I

FACTUAL AND PROCEDURAL BACKGROUND

1. *The Timeshare Purchase Agreement*

Welk is the owner and operator of a vacation timeshare program for properties in California, Missouri, and Mexico. In exchange for free gifts such as hotel stays, dinner vouchers, and tickets to local attractions, Plaintiffs agreed to attend presentations during which Welk attempted to sell them interests in its timeshare program. According to Plaintiffs, Welk engaged in "high pressure" and "misleading sales tactics" during these presentations, including "misrepresenting" the duration of the presentations, dissuading

Plaintiffs from reviewing the written terms of the sale offers, and presenting the sale offers on a "take it or leave it" basis available for one day only.

At the end of the presentations, Plaintiffs each executed a nine-page purchase and sale agreement (Agreement) to buy an interest in Welk's timeshare program. Plaintiffs each financed the purchase through Welk by executing a promissory note and security agreement (Note) in favor of Welk. The Agreement allowed Plaintiffs to cancel with no penalty or obligation within seven days of acceptance, but Plaintiffs did not do so.

Paragraph 13 of the Agreement contains an arbitration provision (Arbitration Provision) that requires the parties to resolve covered disputes on an individual basis in arbitration, rather than in court. The Arbitration Provision provides, in full, as follows:

> 13. DISPUTE RESOLUTION/ARBITRATION. The parties agree that any claim or controversy arising out of or relating to this Agreement in any way shall be resolved in binding arbitration according to the Federal Arbitration Act. In other words, instead of having disputes resolved by a court or jury, all disputes between the parties shall be resolved by binding arbitration. The arbitration shall be conducted in San Diego, California.
>
> The parties further agree to waive any right to bring or participate in any class or representative action relating to or arising from your Platinum Points Purchase. In short, all disputes between the parties shall be resolved in an individual arbitration.
>
> The arbitration will be conducted in accordance with the Commercial Arbitration Rules of the American Arbitration Association ("AAA").[1] A copy of these is [*sic*] available at www.adr.org. If the AAA rules are unavailable or inapplicable, the parties agree to arbitrate their disputes in

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1 The Arbitration Provision accepted by Plaintiff Chavez includes the following italicized language, which is not present in the version accepted by Plaintiffs Holtzclaw and Chantha: "The arbitration will be conducted in accordance with the Commercial Arbitration Rules of the American Arbitration Association ((AAA)) *or in accordance with procedures that are equivalent in substance*." (Italics added.) The parties do not contend that this difference is material to the outcome of this appeal.

> accordance with any rules and procedures that are reasonable and fair to the parties.
>
> If Purchaser is the party initiating the claim, Purchaser will be responsible for the arbitration costs in an amount equal to the filing fee required to initiate a claim in San Diego Superior Court. The Seller [Welk] shall be responsible for all other costs of arbitration.

Two other provisions of the Agreement and Note are material to this appeal. First, Paragraph 14 of the Agreement is a liquidated damages provision that applies if escrow does not close as a result of the buyer's default. It entitles Welk to retain as liquidated damages the lesser of the buyer's deposit or ten percent of the purchase price, as follows:

> **. . . . SHOULD PURCHASER FAIL TO COMPLETE THE PURCHASE OF THE OWNERSHIP BY REASON OF ANY DEFAULT OF PURCHASER HEREUNDER, *[WELK] MAY PROCEED AGAINST PURCHASER UPON ANY CLAIM OR REMEDY WHICH [WELK] MAY HAVE IN LAW OR EQUITY*; PROVIDED, HOWEVER, THAT BY SUBSCRIBING THEIR INITIALS HEREAFTER, PURCHASER AND [WELK] AGREE THAT [WELK] MAY RETAIN A SUM EQUAL TO THE LESSER OF EITHER (i) THE AMOUNT OF THE DEPOSIT AND ANY ADDITIONAL DEPOSIT HEREUNDER OR (ii) TEN PERCENT (10%) OF THE PURCHASE PRICE AS [WELK]'S LIQUIDATED DAMAGES . . . .**

(Italics added.)

Second, Paragraph I of the Note outlines the parties' rights and obligations if the buyer defaults on his or her payments *after* the close of escrow. In the event of a post-closing default, the principal and accrued interest are immediately payable at Welk's election and, after providing a notice of default and an opportunity to object, Welk may repossess the buyer's interest in the timeshare program. Alternatively, Welk may enforce its security interests "by (i) exercise of [a] power of sale in [a] commercially reasonable

manner, (ii) any other collection remedy provided for under Article 9 of the Commercial Code, (iii) *suit at law*, or (iv) any other manner authorized by law." (Italics added.)

2. *The Parties' Dispute*

Years after accepting the Agreement, Plaintiffs informed Welk they desired to terminate their interests in the timeshare program. Welk then filed arbitration demands against Plaintiffs with Judicial Arbitration and Mediation Services, Inc. (JAMS), alleging that Plaintiffs had defaulted on their monthly payments and breached their obligations under the Agreement and the Note. Plaintiffs objected to the arbitration demands on grounds that the Arbitration Provision is unenforceable. As a result of Plaintiffs' objections, JAMS declined to hear the matters and advised the parties it would resume administration only if it were presented with a court order or agreement directing JAMS to administer the matters. There is no indication in the record that Welk pursued its claims against Plaintiffs any further or sought a court order compelling arbitration of its claims.

However, Plaintiffs filed two lawsuits of their own against Welk in superior court, alleging that Welk misrepresented and omitted material facts about the timeshare program during its sales presentation. Welk petitioned to compel arbitration of Plaintiffs' claims and Plaintiffs opposed, again arguing that the Arbitration Provision is unconscionable and, therefore, unenforceable. Plaintiffs alleged that the Arbitration Provision is procedurally unconscionable because it is "hidden" within the "lengthy, boilerplate" Agreement, which Welk presented to Plaintiffs on a "take it or leave it" basis. Plaintiffs also argued that the Arbitration Provision lacks mutuality because it

purportedly requires only Plaintiffs—not Welk—to arbitrate their claims. Plaintiffs argued that the lack of mutuality is evidenced by Paragraph I of the Note, which, as noted *ante*, permits Welk to enforce its security interest by a "suit at law" if the buyer defaults.

The trial court agreed with Plaintiffs and concluded that the Arbitration Provision is unconscionable and unenforceable. The court determined that the Arbitration Provision is procedurally unconscionable because it is "set forth in an adhesion contract." Further, it found that the Arbitration Provision is substantively unconscionable because Paragraph 14 of the Agreement "permits defendants to proceed 'upon any claim or remedy which seller may have in law or equity;' however, plaintiffs are required to proceed only by way of arbitration."[2] On these bases alone, the trial court denied Welk's petitions to compel arbitration.

II

DISCUSSION

1. *Standard of Review*

"Absent conflicting extrinsic evidence, the validity of an arbitration clause, including whether it is subject to revocation as unconscionable, is a question of law subject to de novo review." (*Serpa v. Cal. Surety Investigations, Inc.* (2013) 215 Cal.App.4th 695, 702.) " 'However, where an unconscionability determination "is based upon the trial court's resolution of conflicts in the evidence, or on the factual inferences which may be drawn therefrom, we consider the evidence in the light most favorable to

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2 The trial court did not rely on Paragraph I of the Note (permitting Welk to enforce its security interest by "suit at law") as a basis for finding a lack of mutuality.

the court's determination and review those aspects of the determination for substantial evidence." ' [Citation.] . . . . In keeping with California's strong public policy in favor of arbitration, any doubts regarding the validity of an arbitration agreement are resolved in favor of arbitration." (*Lhotka v. Geographic Expeditions, Inc.* (2010) 181 Cal.App.4th 816, 820-821.)

2. *Unconscionability*

In accepting the Agreement, Plaintiffs agreed that "any claim or controversy arising out of or relating to [the] Agreement in any way shall be resolved in binding arbitration according to the Federal Arbitration Act [FAA]." The FAA embodies "a 'liberal federal policy favoring arbitration' [citation], and the 'fundamental principle that arbitration is a matter of contract.' " (*AT&T Mobility LLC v. Concepcion* (2011) 563 U.S. 333, 339.) Under the FAA, an agreement to settle a controversy by arbitration is "valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract." (9 U.S.C. § 2; *Concepcion*, at p. 339.) Thus, the FAA both promotes arbitration as a streamlined method of dispute resolution and ensures that generally applicable contract defenses, such as fraud, duress, or unconscionability, may still provide grounds for the invalidation of arbitration agreements, so long as those defenses do not interfere with the "fundamental attributes of arbitration." (*Concepcion*, at p. 339; see *Sanchez v. Valencia Holding Co., LLC* (2015) 61 Cal.4th 899, 912 (*Sanchez*).)

One of the generally applicable contract defenses that may provide grounds for the invalidation of an arbitration agreement is the doctrine of unconscionability, which

" 'ensures that contracts, particularly contracts of adhesion, do not impose terms that have been variously described as " ' "overly harsh" ' " [citation], " 'unduly oppressive' " [citation], " 'so one-sided as to "shock the conscience" ' " [citation], or "unfairly one-sided" [citation]. All of these formulations point to the central idea that the unconscionability doctrine is concerned not with "a simple old-fashioned bad bargain" [citation], but with terms that are "unreasonably favorable to the more powerful party." ' " (*Baltazar v. Forever 21, Inc.* (2016) 62 Cal.4th 1237, 1244.) Unconscionability is determined as of the time the contract was entered into, not in light of subsequent events. (Civ. Code, § 1670.5; see *Sanchez, supra*, 61 Cal.4th at p. 920.) Because unconscionability is a contract defense, the party asserting it bears the burden of proof. (*Sanchez*, at p. 911.)

The doctrine of unconscionability includes both procedural and substantive elements. (*Sanchez, supra*, 61 Cal.4th at p. 910.) Procedural unconscionability "addresses the circumstances of contract negotiation and formation, focusing on oppression or surprise due to unequal bargaining power." (*Pinnacle Museum Tower Assn. v. Pinnacle Market Development* (US) LLC (2012) 55 Cal.4th 223, 246 (*Pinnacle*).) "Substantive unconscionability pertains to the fairness of an agreement's actual terms and to assessments of whether they are overly harsh or one-sided." (*Ibid.*)

Procedural and substantive unconscionability must both be present for a court to refuse to enforce a contract as unconscionable. (*Sanchez, supra*, 61 Cal.4th at p. 910.) However, they need not be present to the same degree. (*Ibid.*) Instead, a "sliding scale" approach is employed whereby " 'the more substantively oppressive the contract term, the

less evidence of procedural unconscionability is required to come to the conclusion that the term is unenforceable, and vice versa.' " (*Ibid.*) "The ultimate issue in every case is whether the terms of the contract are sufficiently unfair, in view of all relevant circumstances, that a court should withhold enforcement." (*Id.* at p. 912.)

a. *Procedural Unconscionability*

"Procedural unconscionability pertains to the making of the agreement and requires oppression or surprise." (*Magno v. The College Network, Inc.* (2016) 1 Cal.App.5th 277, 285.) " ' "Oppression occurs where a contract involves lack of negotiation and meaningful choice, surprise where the allegedly unconscionable provision is hidden within a prolix printed form." ' " (*Pinnacle*, *supra*, 55 Cal.4th at p. 247.) Here, the trial court concluded that the Arbitration Provision is procedurally unconscionable solely because it is "set forth in an adhesion contract." As our Supreme Court has explained, an adhesion contract refers to "a standardized contract, which, imposed and drafted by the party of superior bargaining strength, relegates to the subscribing party only the opportunity to adhere to the contract or reject it.' " (*Armendariz v. Foundation Health Psychcare Servs., Inc.* (2000) 24 Cal.4th 83, 113.)

Substantial evidence supports the trial court's finding that the Agreement containing the Arbitration Provision is adhesive in nature. For instance, Plaintiffs submitted declarations indicating that Welk presented them the pre-typed Agreement on a

"take it or leave it" basis with no opportunity to negotiate the deal.[3] Further, it is undisputed that Welk—an entity that owns and manages multiple vacation resorts and offers on-the-spot financing to buyers wishing to purchase an interest in its timeshare program—exercised substantially superior and unequal bargaining strength relative to Plaintiffs. Indeed, Plaintiffs aver in their complaints that they could not afford to purchase the timeshare without obtaining financing from Welk, which alone suggests that Welk exercised financial and bargaining leverage over Plaintiffs.

However, our conclusion that the Agreement is adhesive " 'heralds the beginning, not the end, of our inquiry into its enforceability.' " (*Parada v. Superior Court* (2009) 176 Cal.App.4th 1554, 1571 (*Parada*).) Despite the tendency of courts and litigants to conflate adhesion with oppression, the two terms are not coextensive. As noted *ante*, oppression "involves lack of negotiation *and* meaningful choice." (*Pinnacle, supra*, 55 Cal.4th at p. 247, italics added.). Thus, "[a]lthough adhesion contracts often are procedurally oppressive, this is not always the case." (*Morris v. Redwood Empire Bancorp* (2005) 128 Cal.App.4th 1305, 1320 (*Morris*); *California Grocers Assn. v. Bank of Am.* (1994) 22 Cal.App.4th 205, 214 [adhesiveness is "not per se oppressive"].)

Welk argues that Plaintiffs failed to demonstrate the absence of "meaningful choice" because there is no evidence that they could not look elsewhere for the desired product—an interest in a timeshare program—under more desirable terms. We agree that

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3 Welk argues the Agreement is not adhesive because there is no evidence that Plaintiffs tried to negotiate the Agreement. Welk's argument is disingenuous. There is no indication in the record, and Welk does not argue, that Welk ever would have agreed to alter the terms of its pre-printed Agreement if Plaintiffs had asked it to do so.

"reasonably available alternative sources of supply from which to obtain . . . desired goods and services free of the terms claimed to be unconscionable" generally reduce the oppression of a contract or contract term. (*Morris, supra*, 128 Cal.App.4th at p. 1320 ["little or no procedural unconscionability" where party "failed to allege he could not have obtained merchant credit card services from another source on different terms"]; *Parada, supra*, 176 Cal.App.4th at pp. 1572-1573 ["low to medium degree of procedural unconscionability," in part, because "Petitioners had many reasonable and realistic market alternatives"].) We also agree that Plaintiffs, who bore the burden of proving the defense of unconscionability, introduced no evidence regarding other sources from which they might (or might not) have acquired a timeshare interest, thus undercutting their argument that they had no meaningful choice but to accept the Agreement.

On the other hand, the record suggests that Plaintiffs' ability to obtain the product at issue from a reasonably available alternate source was curtailed, at least in part, by the time constraints Welk imposed on Plaintiffs to accept the sales offer. According to Plaintiffs' declarations, Welk informed Plaintiffs they "needed to decide on the spot" at the sales presentation and "go through with [the purchase] that day." Welk responds that the Agreement allowed Plaintiffs to cancel with no penalty or obligation within seven days of acceptance. Even so, it cannot reasonably be disputed that Plaintiffs' limited window to deliberate Welk's offer and the seven-day cancellation period, at minimum, restrained Plaintiffs' ability to seek and obtain a timeshare interest from another source. (*Magno v. The College Network, Inc., supra*, 1 Cal.App.5th at p. 287 ["high degree" of

procedural unconscionability, even though parties had five business days to cancel agreements after accepting them].)

We are less convinced, however, by Plaintiffs' remaining procedural unconscionability arguments. Plaintiffs argue that the making of the Agreement was marked by a "high level of oppression" because Welk did not discuss the Arbitration Provision with Plaintiffs and assured them they need not review the terms of the Agreement (including the Arbitration Provision therein). However, as our Supreme Court has explained, a contracting party is "under no obligation to highlight the arbitration clause of its contract, nor [is] it required to specifically call that clause to [the other party's] attention." (*Sanchez*, *supra*, 61 Cal.4th at p. 914.) Further, "when a customer is assured it is not necessary to read a standard form contract with an arbitration clause, 'it is generally unreasonable, in reliance on such assurances, to neglect to read a written contract before signing it.' " (*Id.* at p. 915.) Thus, Welk's failure to emphasize the Arbitration Provision does not support a finding of procedural oppression.

Nor are we persuaded by Plaintiffs' arguments pertaining to surprise. Plaintiffs argue the Arbitration Provision was a surprise because it purportedly was "buried" in a "long, standardized contract." However, the Arbitration Provision is not "buried" in the Agreement. On the contrary, it is clearly separated from the remainder of the Agreement by a standalone, capitalized heading. (*Walnut Producers of California v. Diamond Foods, Inc.* (2010) 187 Cal.App.4th 634, 647 (*Walnut*) [no surprise where class action waiver was located "under a heading, 'Dispute Resolution' "]; *Morris*, *supra*, 128 Cal.App.4th at p. 1321 ["[A] clear heading in a contract may refute a claim of surprise"].)

Further, the text of the Arbitration Provision is the same size and font as virtually every other paragraph in the Agreement.[4] (*Parada, supra,* 176 Cal.App.4th at p. 1571 [the fact that the "[t]he arbitration provisions [were] in the same typeface and font size as the rest of the provisions" weighed against surprise]; *Walnut,* at p. 647 [same].) Finally, while the one-day acceptance window and seven-day cancellation period discussed *ante* may have curtailed Plaintiffs' ability to seek alternative market sources, there is no indication that these time constraints were so severe that they prevented Plaintiffs from *reading* the nine-page Agreement or the four-paragraph Arbitration Provision therein.

In sum, there are numerous factors pointing in opposite directions on the issue of procedural unconscionability. On the one hand, the Arbitration Provision was the product of a "bargaining" process between unequal parties, presented to Plaintiffs on a "take it or leave it" basis, and Plaintiffs were subject to time constraints that limited their ability to seek out realistic market alternatives. On the other hand, Plaintiffs presented no evidence pertaining to the availability of such market alternatives (or lack thereof), Welk was under no obligation to highlight the Arbitration Provision, Plaintiffs had a week to review the Arbitration Agreement and cancel the Agreement with no penalty or obligation, and the Arbitration Provision was demarcated with a capitalized heading and text that was the same size and font as the remainder of the Agreement. Collectively, these conflicting factors indicate a moderate level of procedural unconscionability.

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4 The sole exception is Paragraph 14, the liquidated damages provision, which is bolded and capitalized in its entirety.

Because the Arbitration Provision contains at least a minimal degree of procedural unconscionability, we turn now to the second step of the analysis and examine whether the Arbitration Provision contains any substantively unconscionable terms.

b. *Substantive Unconscionability*

"Substantive unconscionability focuses on overly harsh or one-sided results. [Citation.] 'In assessing substantive unconscionability, the paramount consideration is mutuality.' [Citation.] This does not mean that parties may not choose to exclude particular types of claims from the terms of arbitration. However, 'an arbitration agreement imposed in an adhesive context lacks basic fairness and mutuality if it requires one contracting party, but not the other, to arbitrate all claims arising out of the same transaction or occurrence or series of transactions or occurrences.' " (*Fitz v. NCR Corp.* (2004) 118 Cal.App.4th 702, 723; see *Higgins v. Superior Court* (2006) 140 Cal.App.4th 1238, 1253-1254 [agreement requiring petitioners but not respondents to arbitrate their claims was "one-sided," "unconscionable," and "unenforceable"].)

Plaintiffs argue, and the trial court found, that the Arbitration Provision is substantively unconscionable because it lacks mutuality. According to Plaintiffs, the Arbitration Provision compels Plaintiffs to assert their claims in arbitration yet does not require Welk to bring its claims in arbitration. We disagree.

The Arbitration Provision broadly states that "*any* claim or controversy arising out of or relating to [the] Agreement in *any* way shall be resolved in binding arbitration" and "*all* disputes between the parties shall be resolved by binding arbitration." (Italics added.) The expansive terms "any" and "all" to describe the covered claims clearly

conveys that both buyer and seller must arbitrate their claims. (*Baltazar, supra,* 62 Cal.4th at pp. 1248-1249 [contract requiring arbitration of " 'any claim or action['] . . . clearly cover[ed] claims an employer might bring as well as those an employee might bring."]; *Serafin v. Balco Properties Ltd., LLC* (2015) 235 Cal.App.4th 165, 182 ["[W]here an arbitration agreement sets forth that 'any and all' disputes between the parties will be arbitrated, courts . . . have found the agreement to be fully mutual in scope."]; *Tiri v. Lucky Chances, Inc.* (2014) 226 Cal.App.4th 231, 247 [delegation clause requiring arbitration of "any and all differences and/or legal disputes" was "nearly unqualified" and applied mutually].) Thus, the express language of the Arbitration Provision reflects a bilateral obligation to arbitrate that forecloses Plaintiffs' mutuality argument.

Our reading of the Arbitration Provision is reinforced by the final paragraph of the Provision, which reads as follows: "*If Purchaser is the party initiating the claim*, Purchaser will be responsible for the arbitration costs in an amount equal to the filing fee required to initiate a claim in San Diego Superior Court" and Welk "shall be responsible for all other costs of arbitration." (Italics added.) The use of the conditional tense in the first clause of this paragraph ("If Purchaser is the party initiating the claim") confirms that the parties contemplated that a party *other than* the purchaser—i.e., Welk—might also initiate claims in arbitration. But that would not be possible if we were to adopt Plaintiffs' mutuality argument, given that the purchaser would *always* be the party initiating the arbitration. Therefore, Plaintiffs' argument would render this conditional clause mere surplusage. (*Appalachian Ins. Co. v. McDonnell Douglas Corp*. (1989) 214

Cal.App.3d 1, 12 ["An interpretation which renders part of the instrument to be surplusage should be avoided."].)

Plaintiffs argue that two provisions outside of the Arbitration Provision "exempt" Welk from bringing its claims in arbitration. Plaintiffs rely on the liquidated damages provision in Paragraph 14 of the Agreement, which provides that Welk may "proceed against purchaser upon any claim or remedy which seller may have *in law or equity*" if the buyer defaults before the close of escrow. (Bolding, capitalization, and italics altered.) Plaintiffs also cite Paragraph I of the Note, which states that Welk may enforce its security interests through "power of sale," "collection," "*suit at law*," or "any other manner authorized by law." (Italics added.) However, these provisions specify only the *types* of claims Welk may pursue in the event of default (i.e., claims for damages and injunctive relief), in addition to or in lieu of exercising its rights to collect liquidated damages and repossess the buyers' ownership interests. These provisions do not specify the *forum* in which Welk must assert its claims. Rather, as discussed *ante*, it is the Arbitration Provision that specifies where such claims must be heard—in arbitration.

Plaintiffs rely on *Thornton v. California Unemployment Insurance Appeals Board* (2012) 204 Cal.App.4th 1403 as authority for their argument that a "suit at law or in equity" may only be brought in a judicial forum. *Thornton* is inapposite. In that case, an investigation was opened to determine whether a judge's hiring violated state law. (*Id.* at pp. 1408-1409.) The judge incurred expenses in connection with the investigation and sought reimbursement from her employer under Government Code section 996.4, which grants public employees a right to reimbursement for fees, costs, and expenses incurred

to defend "against a civil action" arising out of an act or omission in the scope of employment. (*Id.* at pp. 1410, 1412.) We found reimbursement was not warranted because a "civil action" encompasses suits "at law or in equity" among other proceedings—all of which, we explained, "take place in a court; none is an investigation that takes place outside a court setting." (*Id.* at pp. 1413-1414.)

Insofar as Plaintiffs argue that our statement in *Thornton v. California Unemployment Insurance Appeals Board, supra,* 204 Cal.App.4th 1403 suggests that a suit at law or equity invariably refers to an action in a judicial forum *in contrast to arbitration*, Plaintiffs overread *Thornton.* (*People v. Ault* (2004) 33 Cal.4th 1250, 1268 fn. 10 ["[C]ases are not authority for propositions not considered."].) Our statement was intended only to convey that an *investigation* is not a "civil action" for purposes of Government Code section 996.4, and thus does not support Plaintiffs' argument.

In any event, even if the provisions highlighted by Plaintiffs created ambiguity as to the scope of the Arbitration Provision, public policy considerations and canons of construction would require us to find mutuality to preserve the Arbitration Provision's validity. The public policy in favor of arbitration would dictate this result. (*Roman v. Superior Court* (2009) 172 Cal.App.4th 1462, 1474 [in the case of ambiguity, courts must "construe [an] arbitration agreement as imposing a valid, mutual obligation to arbitrate"]; *24 Hour Fitness, Inc. v. Superior Court* (1998) 66 Cal.App.4th 1199, 1215 ["[B]ecause of the strong public policy in favor of arbitration, 'courts will " 'indulge every intendment to give effect to such proceedings.' " ' "].) So, too, would Civil Code section 3541, which provides that "[a]n interpretation which gives effect is preferred to one which makes

void." Likewise, Civil Code section 1643 directs us to interpret a contract "as will make it lawful, operative, definite, reasonable, and capable of being carried into effect, if it can be done without violating the intention of the parties." Individually and collectively, these authorities require us to construe the Arbitration Provision as imposing mutual arbitration obligations on the parties.

As noted *ante*, a court may only decline enforcement of an arbitration agreement on unconscionability grounds if the agreement contains elements of both procedural and substantive unconscionability. (*Sanchez*, *supra*, 61 Cal.4th at p. 910.) Plaintiffs have identified no provision in the Arbitration Provision that is so overly harsh, unduly oppressive, or unfairly one-sided that it constitutes a substantively unconscionable term.[5] Accordingly, the Arbitration Provision must be enforced.

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[5] Plaintiffs suggest on appeal that the liquidated damages provision and a provision of the Note entitling Welk to recover its collection fees in the event of a buyer default are one-sided and, therefore, substantively unconscionable. However, Plaintiffs forfeited appellate consideration of these unconscionability arguments because they failed to raise them in the trial court. (*Colony Insurance Co. v. Crusader Insurance Co.* (2010) 188 Cal.App.4th 743, 751.)

DISPOSITION

The orders are reversed. Each party to bear its own costs in this appeal.

O'ROURKE, J.

WE CONCUR:

NARES, Acting P. J.

GUERRERO, J.